

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE
COUNSEL, INC., et al.,

Plaintiffs,
vs.

No. CIV S-88-1658 LKK GGH

KIRK RODGERS, et al.,

Defendants.

ORDER

Introduction

On July 15, 2005, the court ordered briefing on whether NRDC, a recipient of inadvertently produced documents from the files of Friant's former general counsel Gary Sawyers, was entitled to review and copy non-privileged documents from that file.¹ The parties

¹ At the end of the phone conference, the undersigned had ordered:
1. That the inadvertently produced discs be returned to Friant counsel; all copies of the discs, or printouts therefrom, were either to be returned or destroyed;
2. Counsel for Friant was to preserve all returned materials as they were received from NRDC counsel until further order of the court.
The undersigned ordered the return of the discs in the interim because it was likely that a good deal of material on the discs was privileged, which would have to be returned in any event, and in order to squelch any allegations that NRDC had done something inappropriate with the discs pending this order. However, return of the discs was without prejudice to NRDC's arguing for return of the non-privileged documents as it colorably asserted that it would have been entitled to retain the non-privileged documents. The court's temporary

1 have filed the required briefing, and the court issues the following order.

2 Facts

3 The facts of the controversy are undisputed for the most part. The parties have
4 produced electronic versions of their initial disclosure productions as ordered in the Discovery
5 Plan Order and Schedule of May 3, 2005. As luck would have it, Friant's electronic production
6 was difficult or impossible to open and read; it was not searchable. Friant forwarded an
7 "improved" version of its initial disclosures; however, as [bad] luck would have it again, Friant's
8 digital reproduction company had also scanned, or otherwise electronically reproduced, the files
9 of Friant's long time general counsel, and inadvertently submitted the counsel files in place of a
10 technically "improved" version of the initial disclosures. These general counsel discs were given
11 to counsel for Friant by the reproduction company with the incorrect designation, i.e., the discs
12 were not the improved version of the initial disclosures as indicated, but rather the discs of the
13 general counsel's files, and presumably containing some privileged material. The mislabeled
14 discs were then produced to NRDC.

15 Upon reviewing the newly sent discs, Ms. Poole, counsel for NRDC, and/or others
16 on the NRDC attorney staff, at some point recognized that they had inadvertently been sent
17 possibly privileged material. To their credit, counsel for NRDC contacted counsel for Friant
18 with this information. In the meantime, it appeared that NRDC had further reviewed and made
19 some copies of the documents at issue, but the extent of that copying and whether the copying
20 included privileged materials, is unclear. Evidently at one time in the course of discussions,
21 Friant offered to create a privilege log if all the discs would be returned. However, counsel could
22 not ultimately agree on the procedures for return of the potentially privileged information as well
23 as the non-privileged information. Friant demanded that the entire inadvertent production be
24

25 order with respect to the return of the discs and all other copied information was an interim
26 logistical order contemplating that Friant might have to return to NRDC the inadvertently
produced non-privileged material.

1 returned. NRDC believed, based on its limited review, that many of the documents were not
2 privileged, and the non-privileged documents, inadvertently produced or not, did not have to be
3 returned. NRDC believed that it was entitled to retain non-privileged documents, and that Friant
4 should produce a privilege log for the inadvertently produced general counsel files, and disputes
5 over the designation could then be adjudicated.

6 Discussion

7 No party maintains the position that to the extent the inadvertent production of
8 the Sawyer discs contained privileged material, the privilege was waived. The court certainly
9 agrees; the production was inadvertent in every sense of the word, and essentially without fault
10 on the part of Friant, its attorneys, and perhaps even with respect to the digital reproduction
11 company assisting Friant in this case. Accidents, in the absence of negligence, do happen.
12 Because the privileged document part of the inadvertent production is without dispute, the court
13 will not discuss the inadvertent disclosure doctrine with respect to privileged materials. The
14 court turns to the issue at hand—whether NRDC nevertheless is entitled to “retain” (see footnote
15 1) the non-privileged documents.

16 Friant first argues that because the inadvertently produced discs of general
17 counsel’s Sawyer’s files would never have been part of the Rule 26 initial disclosures, NRDC
18 should not reap a windfall benefit simply because of the inadvertent nature of the production.
19 However, NRDC is correct in its rejoinder that it would not have mattered how or for what
20 reason the Sawyer discs were inadvertently produced—the fact is they were produced. Thus,
21 whether the Sawyer discs were inadvertently produced pursuant to a discovery request, summary
22 judgment proceeding, or whether they fell off a truck and were subsequently taken to NRDC, is
23 all fairly irrelevant. Because the court is not assessing fault, after presumptively finding Friant
24 without fault, the particular scenario of inadvertent delivery will not play a part in the court’s
25 analysis.

26 \\\

1 The next Friant argument concerns its contention that NRDC violated the ethics
 2 rules of the Eastern District when it continued to review the Sawyer discs once it “knew” that the
 3 disc information was privileged. Hence, Friant argues, as an ethical sanction, NRDC should not
 4 be permitted to retain any documents. However, California’s ethics rules have been adopted by
 5 the court as the ethics standards applicable to attorneys, see Eastern District Local Rule 83-180
 6 (e), and California’s ethics rules do not proscribe NRDC’s conduct—even if counsel continued to
 7 review the discs after it recognized that *some* information was privileged. Aerojet General v.
 8 Transport Indem. Co., 18 Cal. App. 4th 996 (1993).²

9 Friant’s ethical position also misses the point of the dispute herein. This is not a
 10 situation where *only* privileged information is at issue, see State Fund v. WPS, Inc., 70 Cal. App.
 11 4th 644 (1999), but the much more complex situation of a hybrid privileged and non-privileged
 12 disclosure.³ In State Farm, the privileged documents at issue were clearly segregated from the
 13 bulk of documents delivered in response to discovery obligations. Thus, even if the sanction
 14 advocated by Friant is appropriate when only privileged documents are concerned, the sanction is
 15 inapplicable in this hybrid situation. NRDC has appropriately cited Aerojet General v. Transport
 16 Indem. Co., supra, for the proposition that that counsel who receive inadvertently produced non-
 17 privileged information are entitled to review it, and may even have an ethical obligation to their
 18 clients to review it. This situation involves competing ethical concerns. In such a situation, an
 19 order requiring final “return” of the non-privileged information based on an ethics rules sanction
 20 is inappropriate.

21 Moreover, counsel for NRDC substantially complied with the procedures set forth
 22 by State Fund in any event. This case permits further cursory review of inadvertently produced

23 ² While it is true that California has no written ethical rules on point, the undersigned
 24 views the Aerojet General case as filling the gaps.

25 ³ The court accepts, at this juncture, NRDC’s likely representation that not all
 26 information within Sawyer’s files was privileged. However, the court further addresses infra,
 the potential irrelevance of non-privileged information.

1 documents for the purpose of determining what may be clearly privileged and further court
2 proceedings regarding further use of the documents. Id., 70 Cal. App. 4th at 656-57. The
3 undersigned further notes that the precise issue of an attorney's ethical obligations upon
4 receiving inadvertently produced privileged documents is pending before the state supreme court.
5 See Rico v. Mitsubishi Motors Corp., 10 Cal. Rptr.3d (2004) review granted, 14 Cal. Rptr. 3d
6 210 (2004). So, the ethical conundrum here is much more complicated than the "simple"
7 privileged documents only scenario. NRDC could not be sanctioned given the present state of
8 California law.

9 Finally, the ABA formal opinions cited by Friant 92-368 and 94-382, which are
10 secondary ethical opinion materials, which may be relied upon in the absence of California
11 authority, do not persuade in the current context in any event. Both refer to "privileged" or
12 "confidential" materials, e.g., "[w]hen an attorney receives, unauthorized, an adverse party's
13 materials, once the attorney becomes aware of the privileged or confidential nature of the
14 materials, the attorney must refrain from viewing *such materials*." Opinion 94-382. The court
15 views the emphasized words as referring to "privileged or confidential" materials. Any other
16 interpretation would lead to absurd results. If in the course of reviewing transmitted documents,
17 the reviewing attorney happens to come upon some decidedly privileged material, perhaps
18 inadvertently produced, the attorney would have to stop all review—because, who knows, there
19 may be some other privileged material in documents yet to be reviewed—and prejudice his client
20 by adding time (money) and time (delay) in sorting out the transmitter's mistake. This is a
21 situation where NRDC represents that it saw significant, unprivileged documents mixed in with
22 privileged documents. The fact that the entire discs may have been improperly transmitted, a fact
23 unknown for some time to NRDC, does not make privileged-unprivileged materials—, and under

24 \\\

25 \\\

26 \\\

1 California ethics law, an attorney is free to review such unprivileged materials.⁴

2 Friant is probably correct in a limited respect that NRDC at all times had a duty to
3 return the original discs no matter what the content. Equating the transmission of property which
4 the sender had no intent to transmit with “lost property,” it is clear that under California law the
5 property itself had to be returned because NRDC knew the identity of the owner of the “lost
6 property.” See 2 Witkin & Epstein, *California Criminal Law*, 3rd ed. 1988 § 19; Cal. Civil Code
7 2080. However, the issue here does not revolve about the return of physical property—NRDC
8 does not claim that it is entitled to the originally transmitted discs—the issue concerns the
9 retention of information transmitted—to be copied or remembered.

10 In sum, the point of the above discussion is not to fashion specific ethics rules for
11 the Eastern District, but to answer Friant’s contention that NRDC committed a clear-cut ethical
12 violation for which it should be punished with an order refusing to allow NRDC to retain non-
13 privileged documents. Under present controlling law, no such clear-cut violation took place; the
14 court does not believe any violation took place. NRDC reviewed some information, but when it
15 became concerned that all such information may have been inadvertently produced (despite
16 Friant’s transmitted cover assurances that these *were* the new discs which replaced the old), it
17 stopped review and copying and submitted to court guidance after notifying Friant counsel. In
18 the absence of an ethics violation, the court declines to sanction NRDC with an order taking
19 documents away which it might otherwise have a right to retain.

20 Thus, the court turns to the final point of analysis—do federal discovery rules or
21 case law require the return of the non-privileged information by a person or entity which receives
22 inadvertently sent non-privileged materials. Case law to date provides for no such rule, and if
23

24 ⁴ The court recognizes that different bar associations take different positions on this issue
25 of return of any documents inadvertently transmitted, see the discussion of the New York City
26 Bar Assoc. contained as an attachment in *Kondakjian v. Port Authority of New York etc.* 1996
WL 139782 (S.D.N.Y. 1996); however, the undersigned finds California’s stated rule as binding
and persuasive.

1 rules may be fashioned by negative implication, NRDC has proffered a case which supports its
 2 position. See Mineba Co. Ltd v. Papst, 370 F. Supp. 2d 297 (D.D.C. 2005):

3 The Court is not clear, however, whether Papst continues to assert
 4 privilege with respect to all of the inadvertently produced
 5 documents or just a subset. A brief review of the inadvertently
 6 produced documents suggests to the Court that at least some of
 7 these documents have been improperly characterized as privileged.
 8 For example, PL 332540 is a cover letter from Mr. Schnayer to
 9 Georg Papst forwarding a draft letter to Mr. Kurihara. See In
 10 Camera Exhibit 6. A cover letter does not “rest on confidential
 11 information obtained from the client.” In re Sealed Case, 737 F.2d
 12 94, 99 (D.C.Cir.1984). It therefore is not privileged.

Because the Court is not clear which documents are still at issue,
 the Court will not conduct a document-by-document analysis at
 this time..... The Court therefore will refrain from ruling on the
 question of the privileged nature of these documents pending its
 ruling in connection with Report and Recommendation No. 29.
 The Court is confident, however, that Papst will immediately
 release any clearly non-privileged documents from this group of
 inadvertently produced documents.

13 Id. at 301.⁵

14 The undersigned has also conducted an independent search and cannot find further
 15 federal discussion of the precise issue at bar. However, the undersigned returns to the California
 16 case of Aerojet General, and finds it persuasive in the present context. (Finding that the
 17 receiving attorney had a duty to use non-privileged information on behalf of his clients, and “[i]f
 18 the underlying information which respondents sought to prevent plaintiff from using is not
 19 privileged, and if such information was revealed to plaintiffs’ counsel through no fault or
 20 misconduct of his own, plaintiffs and their counsel were entitled to use it.” 18 Cal. App. 4th at
 21 _____

22 ⁵ The court does not find terribly significant NRDC’s proffer of cases where a privilege
 23 was found to be waived by inadvertent production, and therefore the party in receipt was able to
 24 retain the now declared non-privileged document. It appears that the only real issue was whether
 25 the privilege at issue had been waived—not what next would happen to the documents should the
 26 privilege be found waived. Retention of documents whose status became non-privileged through
 waiver was an undisputed, foregone conclusion. To that extent, the acceptance of counsel in
 many cases that an adversary was entitled to retain documents whose privilege was waived, i.e.,
 there was no secondary doctrine of return of inadvertently produced non-privileged documents,
 indicates the solitary nature of Friant’s position.

1 1005.) Courts do not stand ready to assist a party in rectifying every harmful mistake made,
 2 inadvertent or otherwise. Litigants live with their mistakes however accidental except where
 3 important doctrines like privilege are implicated, and even then, they may have to live with their
 4 mistakes. For example, if a party deponent mistakenly or inadvertently volunteers non-privileged
 5 information at a deposition in response to a question which did not call for the information, and
 6 the information is very case sensitive, but not privileged, a court will not strike the volunteered
 7 information and refuse its use in litigation simply because the party hurt by the mistake declares
 8 that his opposition had no “right” to the information. Similarly, if a party in response to a
 9 specific discovery request inadvertently sends to his adversary non-privileged information
 10 extraneous to that specific discovery request, the sending party is not entitled to return of the
 11 information no matter how extraneous to the specific question.

12 The court finds that NRDC is entitled to “retain,” i.e. have returned to it, the non-
 13 privileged material inadvertently sent to it, or copies thereof.

14 Now comes the hardest part—how to determine what is non-privileged. And, as
 15 discussed below, the court advises the parties that there is monetary risk associated with their
 16 actions. NRDC shall inform the court and counsel in writing no later than August 10, 2005,
 17 whether it will formally seek to have the non-privileged documents returned⁶; if NRDC opts to
 18 make the formal request, Friant shall prepare and file by August 22, 2005, a detailed privilege
 19 log⁷, along with precise argument as to why a document, or category of documents is privileged;
 20 NRDC may respond by reply no later than August 29, 2005. The undersigned will hear the
 21 matter on September 1, 2005 at 10:00 a.m. Friant shall have ready for in camera review an

22 ⁶ NRDC should exercise good judgment in this respect. If, in fact, the nature of the non-
 23 privileged documents spotted by NRDC have the irrelevancy equivalent of Mr. Sawyer’s favorite
 24 chocolate chip cookie recipe, NRDC should not waste the court’s and Friant’s time with a
 25 proceeding to return meaningless documents. There may be a cost associated with fishing
 expeditions.

26 ⁷ “Privilege” is not limited to attorney-client privilege but encompasses any recognized
 privilege or immunity from disclosure.

1 electronic disc of all contested documents. Copies of the inadvertently produced documents
2 which are not considered privileged shall be made available to NRDC prior to the hearing.

3 If NRDC invokes the formal process, and the undersigned finds that Friant has
4 made a significant number of privilege assertions which were meritless, Friant may be subject to
5 significant sanctions. On the other hand, should NRDC oppose assertions of privilege which
6 cannot reasonably be opposed, NRDC may also be subject to sanctions.

7 DATED: 8/3/05

8 /s/ Gregory G. Hollows

9
10 GREGORY G. HOLLOWS
UNITED STATES MAGISTRATE JUDGE

11 GGH:gh:035
12 NRDC1658.ord2
13
14
15
16
17
18
19
20
21
22
23
24
25
26